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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-929

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

J. W. GAMBLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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v.

J. W. GAMBLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Whether a *pro se* petition by an illiterate prisoner alleging a violation of 42 U.S.C. §1983 must be read with great liberality as to form, must be assumed as true, and must be read with special scrutiny as to facts.

2. Whether it is error for a magistrate and district court to apply the prison deference rule to a suit charging violations of constitutional rights.

3. Whether allegations of deliberate indifference to the medical needs of a prisoner constitute a cause of action under 42 U.S.C. §1983.

4. Whether allegations of refusal to diagnose or treat the medical problem of a prisoner constitute a cause of action under 42 U.S.C. §1983.

5. Whether Gamble's complaint alleges either deliberate indifference to his medical needs or a refusal to provide him with diagnosis and treatment for his medical problem.

6. Whether the "exceptional circumstances" test proposed by petitioners would negate the injunctive relief available under 42 U.S.C. §1983.

7. Whether a federal court can rely on a "flood of litigation" argument when the claim is made that a protected constitutional right has been seriously infringed.

8. Whether the penal and judicial systems can turn their backs on cases such as Gamble's because there are simply too many of them, or whether the states must take steps to remedy the problem by improving prison medical care and by providing screening processes for such cases before they reach the courts.

9. Whether *obiter dictum* not bearing on any ultimate issue can constitute reversible error.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate and incomplete in several respects. First, it is absolutely critical that this Court keep in mind that no answer was filed by the defendants in the trial court, absolutely no

discovery or evidentiary hearing has taken place, and there was not even a FED. R. CIV. P. 12(b) motion or hearing. Much of petitioners' brief gives the impression that there are some facts known in this case beyond those contained in Gamble's complaint. Such an impression is false.

Second, respondent Gamble totally disagrees with the remark on page 4 of petitioners' brief that the decision below and the decision of this Court "depend entirely upon the *facts* alleged by Respondent in his complaint. . . ." The decision of the Fifth Circuit turned on the failure of the district court to require an answer and at least enough discovery to provide the facts necessary to determine whether Gamble has stated an actionable claim under 42 U.S.C. §1983.

Third, the facts set forth in petitioners' Statement of the Case are inaccurate or incomplete on the following points:

November 10, 1973. Petitioners' assertion that Dr. Astone diagnosed Gamble's injury as a lower back sprain is not supported by the record. Gamble's complaint states: "Dr. Astone's medical record show that plaintiff receive a *lower back strain.*" (A-5). The complaint does *not* say *who* made this diagnosis. It could easily have been the medical assistant who saw Gamble the day before, or perhaps the inmate nurse who gave Gamble the pain pills.

Even more important than the silence as to who made the diagnosis, is the complete silence throughout the complaint as to on what the diagnosis is based. Nowhere in the complaint is it stated that *any* diagnostic tests were ever performed relating to the back injury. In their brief before this Court, petitioners

stress that "a comprehensive examination of low back pain consists of a series of simple physical movements and should take no more than fifteen minutes." (Petitioners' brief, p. 17). There is nothing in Gamble's complaint to indicate that such an examination ever took place, and it cannot simply be assumed that there was such an examination. Under the allegations of this complaint, it is possible that Gamble could prove that no diagnostic tests whatsoever took place.

November 12, 1973. Petitioners neglect in their Statement of the Case to point out that on this date Dr. Astone ordered that Gamble be placed on a lower bunk for one week. The Building Department refused to issue Gamble a lower bunk and he had to remain on a top bunk. (A-5).

December 3, 1973. Although Gamble told Dr. Astone that his back was as painful as the day of the injury, Astone took him off of cell pass-cell feed, which meant that Gamble would have to return to work. Despite Gamble's statement that approximately three weeks of pain pills and bed rest had done nothing to alleviate his injury, he was ordered back to work without any diagnostic tests. When Gamble complained of his pain to Major Muddox, he was placed in administrative segregation. (A-6).

December 6, 1973. After telling the unit disciplinary committee that he had high blood pressure as well as a back injury, Gamble was sent to see Dr. Gray. Gray performed a urinalysis, blood analysis, and high blood pressure test. (A-6, 7). There is absolutely nothing in the record to indicate that these tests had anything whatsoever to do with the back injury.

Furthermore, as was the case with Dr. Astone, there is nothing in the record to support petitioners' assertion

that Dr. Gray diagnosed Gamble's injury as a lower back sprain. (Petitioners' brief, p. 5). The complaint states: "Doctor Gray medical record show the plaintiff receive a lower back strain." (A-6). Two doctors in the same hospital would not keep separate records on the same patient. Hence, the record which Gamble refers to as Dr. Gray's record is undoubtedly the same as what Gamble earlier in his complaint referred to as Dr. Astone's record. In fact, the record is simply J.W. Gamble's record, and although it apparently indicated that he had a lower back strain, it is impossible to determine who made that entry. Once again, there is nothing to indicate that Dr. Gray conducted any tests to diagnose the back injury, and there is no indication that Gray entered a diagnosis in the records.

January 3-5, 1974. Although he was receiving medication for back pain and heart trouble, Gamble was told to return to work and that he would be sent to the farm if he refused. (A-8).

January 7, 1974. Petitioners completely neglect to inform the Court that at 8:00 a.m. on this date, Gamble requested to go on sick call because of back pain and migraine headaches. At noon, Officer Powell returned and told Gamble that he couldn't go. At 3:00 p.m. that day Gamble was allowed to go to the hospital but did not see a doctor. (A-8).

January 31, 1974. On January 7, 1974, Captain Blunt prescribed Ser-Ap-Es for Gamble for 30 days. (A-8). This drug is a treatment for hypertension. PHYSICIANS' DESK REFERENCE 694-696 (28th ed. 1974). On January 25, 1974, Captain Blunt prescribed sodium salicylate for Gamble for 30 days. (A-9). This drug is an analgesic or pain reliever. DORLAND,

ILLUSTRATED MEDICAL DICTIONARY 1400 (24th ed. 1965). However, on January 31, 1974, while these prescriptions for hypertension and low back pain were still in effect, the very man who issued the prescriptions testified that Gamble was in first class medical condition. (A-10). First class is the "most fit" classification of the five medical categories used by the Texas Department of Corrections. *Report of The Citizens' Advisory Committee to The Joint Committee on Prison Reform of The Texas Legislature,* November 1974 (see page A-8 of plaintiff-appellant's Fifth Circuit Brief).

Petitioners' Statement of the Case also neglected to point out that there is no indication that any doctor testified before the disciplinary committee and that no doctor, doctor's aid, or other medical personnel examined Gamble before he was placed in solitary confinement. (A-9, 10).

February 4, 1974. Petitioners overlook the fact that Gamble asked to see a doctor at 8:00 a.m. His request was not acted upon until 7:30 p.m., at which time a medical personnel examined Gamble. By then, the condition of Gamble's chest pain and high blood pressure was such that he was admitted to the unit hospital. (A-10).

February 7-8, 1974. As correctly noted by petitioners, Gamble asked to go on sick call both days because of pain in his lower back, chest, and left arm. The guards refused to allow him to go to sick call. (A-11).

SUMMARY OF ARGUMENT

The Fifth Circuit found that Gamble's complaint alleged actions which were tantamount to a ***refusal*** of medical care. Thus, the holding does not conflict with holdings of other circuits, all of which agree that a refusal of medical care violates a prisoner's Eighth Amendment guarantee against cruel and unusual punishment. This case involves far more than a mere disagreement as to diagnosis.

The emerging test on this issue is whether a complaint alleges *deliberate indifference* to the medical needs of a prisoner. Gamble's complaint does not indicate that any diagnostic tests were ever conducted to determine the nature and extent of his back injury; does not indicate whether any *doctor* ever made a diagnosis; does indicate that the pain persisted; does indicate that despite the persistence of the pain over a period of months, nothing was done other than prescribe pain pills, muscle relaxers, and bed rest. The complaint also lists a series of acts–refusals to allow Gamble to go to sick call, placing him in solitary confinement because he was too badly injured to work, threatening to send him to the farm if he did not return to work–which, *completely aside from diagnosis and treatment,* constitute deliberate indifference toward Gamble's medical needs.

Petitioners' "flood of litigation" arguments are improper in a case such as this one where a denial of a substantial constitutional right has been alleged. Furthermore, there will be no flood of cases such as Gamble's from Texas in the future because an administrative review procedure has recently been

established there which will insure that all future cases such as Gamble's will reach the district court with a well developed fact record. Gamble only asks that he be allowed to attempt to develop such a record in support of his complaint.

The Fifth Circuit and this Court are free to take judicial notice of public documents which describe the woefully inadequate condition of medical care in the Texas prison system. In any event, the Fifth Circuit's decision was in no way based on the overall condition of medical care in the system and petitioners have not even alleged that their substantial rights have been prejudiced by the Fifth Circuit's consideration of the document in question.

I.

THE DECISION BELOW DOES NOT DISAGREE WITH LICENSED PHYSICIANS AS TO DIAGNOSIS, AND, THEREFORE, DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURTS OF APPEALS.

During his tenure on the United States Court of Appeals for the Eighth Circuit, Justice Blackmun wrote that "a prisoner of the state does not lose all his civil rights during and because of his incarceration." One civil right which a prisoner retains is the Eighth Amendment's guarantee against the infliction of cruel and unusual punishment. *Jackson v. Bishop,* 404 F.2d 571, 576 (8th Cir. 1968). Respondent J.W. Gamble, an inmate in the Texas Department of Corrections (T.D.C.), has alleged a denial of medical care so severe

that it constitutes cruel and unusual punishment. The magistrate and the district court applied an outmoded and discredited test of sufficiency to Gamble's complaint. When said complaint is read in the manner dictated by law and the proper test of sufficiency is applied, there can be no doubt that Gamble's complaint has stated a cause of action under 42 U.S.C. §1983.

A. Gamble's complaint alleges a failure to diagnose and treat, not a simple disagreement as to the result of a diagnosis.

1. The magistrate and the district court erred in applying the discredited prison deference rule to a suit charging violations of constitutional rights.

At the very outset, it is critical for this Court to note that whatever standard petitioners or respondent urge upon the Court as the proper standard for reviewing complaints such as Gamble's there is *no dispute* that the standard applied by the magistrate and the district court was wrong.

The magistrate based his recommendation of dismissal on the language in *Lawrence v. Wainwright,* 440 F.2d 379, 380 (5th Cir. 1971), that "in order to state a claim [under 1983] . . . , the complaint must allege an abuse of discretion by prison authorities in providing medical treatment for prisoners." (A-18). The present case was an improper one for the application of this "prison deference rule" or "hands off doctrine."
TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972). See also *La Buy v. Howes Leather Co.,* 352 U.S. 249, 256 (1957). The record indicates that the district

court did abdicate its responsibility to decide the case. In short, there is no doubt that the wrong standard was applied in reviewing Gamble's complaint, and the record indicates that the magistrate's recommendation—based on this improper standard—was accepted by the district judge without any independent review.

2. Deliberate indifference to the medical needs of a prisoner constitutes a violation of 42 U.S.C. §1983.

Petitioners have argued that a claim is stated under 42 U.S.C. §1983 for inadequate medical care only when a complaint alleges a refusal of care or inadequate care coupled with exceptional circumstances. Although Gamble's petition does state a cause of action even under this stringent standard, respondent would urge the Court to find that deliberate indifference to the medical needs of a prisoner constitutes a violation of 42 U.S.C. §1983.

The principle that a prisoner does not lose all of his civil rights because of his incarceration is well established. One right which he retains is the right to be free from cruel and unusual punishment. *Jackson v. Bishop,* 404 F.2d 571, 576 (8th Cir. 1968).

The magistrate and the district court erred in looking for allegations of abuse of discretion by prison officials when they should have been looking for allegations of violations of Gamble's constitutional rights. Prison officials have no discretion to violate the United States Constitution, particularly when the violation bears no relation to discipline, security, or any other concomitant of proper prison administration. Denial of medical care is not such a concomitant.

Admittedly, allegations of mere negligence by prison medical personnel or disagreement as to diagnosis do not constitute actionable claims under the Civil Rights Act. *Gittlemacker v. Prasse,* 428 F.2d 1 (3d Cir. 1970); *Flint v. Wainwright,* 433 F.2d 961 (5th Cir. 1970). The allegations must be considerably more serious than that.

> Hence an action against prison officials for inadequate medical care may be brought under the Civil Rights Act in the federal district courts when the prisoners allegations rise to the level of cruel and unusual punishment in violation of the Eighth Amendment.

Martinez v. Mancusi, 443 F.2d 921, 923 (2d Cir. 1970). See also, *Gittlemacker v. Prasse, supra* at 6.

The question of what facts a complaint must allege to rise to the level of cruel and unusual punishment and thereby state a claim under the Civil Rights Act was examined thoroughly in *Campbell v. Beto,* 460 F.2d 765, 768 (5th Cir. 1972):

> The Fourth Circuit has spoken directly to the proper and improper uses of the doctrine.
>
> > The hands-off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of imprisonment. Deprivations of reasonable medical care . . . are not among such concomitants, however.
>
> *Edwards v. Duncan,* 355 F.2d 993, 994 (4th Cir. 1966). In *Newman v. Alabama,* 503 F.2d 1320, 1329 (5th Cir. 1974), the Fifth Circuit agreed with the Fourth Circuit that:

. . . [T]his court has been cognizant of the fact that deference which shields officials engaging in intemperate action and which excuses judicial myopia is incompatible with our role as arbiters of the Constitution and hence cannot be countenanced. Thus, while obedient to our limited function in passing upon prison complaints, we have not been impervious to the need to fetter prison officials where constraints are constitutionally appropriate. For example, in Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968), we remonstrated that once an individual is incarcerated, "any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny." And we amplified these concerns in Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972), observing that:

> "Whatever may be the outer contours of the 'prison discipline rule', it is apparent that the courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being. . . . . If 'the deprivation of basic elements of hygiene' has consistently been held violative of constitutional guarantees . . . , then certainly practices of adequate medical treatment, particularly such deprivation as immediately threatens life and limb, would be equally vulnerable."

While deference to the actions of prison officials is appropriate in areas of legitimate prison administration, it is grossly inappropriate in a case such as the present one. Neither petitioners nor respondent argue that the prison deference rule is appropriate in this suit. Thus, whatever standard this Honorable Court chooses to articulate, it *must* keep in mind that the magistrate

used the *wrong* standard in reviewing Gamble's complaint.

It should also be noted that there is no indication in the record that the district court reviewed the record or did anything other than blindly accept the magistrate's recommendations (A-20, 21). The Seventh Circuit has noted that:

> . . . [T]here is to be "no abdication of the decision-making responsibility" of district courts . . . "the district judge is to retain the ultimate responsibility for the conduct of pretrial or discovery proceedings," and . . . §636(b) "cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them."
>
> Whatever may be the outer contours of the "prison discipline rule", it is apparent that the courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being . . . . If "the deprivation of basic elements of hygiene" has consistently been held violative of constitutional guarantees. . . , then certainly practices which result in the deprivation of basic elements of adequate medical treatment, particularly such deprivation as immediately threatens life and limb, would be equally vulnerable.

Petitioners' brief (at pp. 10-12) incorrectly states that the Second and Eighth Circuits hold that to state a cause of action under 42 U.S.C. §1983 for inadequate medical care, a prisoner must allege a refusal of treatment. In fact, both of these circuits hold, and respondent urges this Court to hold, that:

> . . . "[A] charge of deliberate indifference by prison authorities to a prisoner's request for

essential medical treatment is sufficient to state a claim."

Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975); see also *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974).

3. When being considered for summary dismissal, the allegations in a *pro se* petition alleging a violation of 42 U.S.C. §1983 must be read with great liberality as to form, must be assumed to be true, and must be read with special scrutiny as to facts.

In *Haines v. Kerner*, 404 U.S. 519, 520 (1972), this Court noted that it holds *pro se* complaints to a less stringent standard than formal pleadings drafted by lawyers. Several years before *Haines* the Fifth Circuit adopted a similar rule recognizing that prisoners handling their own cases are "unschooled in the intricacies of pleading and procedure." *Granville v. Hunt*, 411 F.2d 9, 10 (5th Cir. 1969).

It is clear from J.W. Gamble's petition that he is not only unschooled in the law but also unable to spell, punctuate, or construct a sentence. Admittedly this makes the petition difficult to read and interpret. However, such difficulty calls for even greater liberality and care in scrutinizing the petition than would be accorded a well-drafted pleading.

When ruling on a motion to dismiss a complaint under FED. R. CIV. P. 12(b), a court must accept the allegations of the complaint as true. *Cooper v. Pate*, 378 U.S. 546 (1964); *Campbell v. Beto*, 460 F.2d 765, 766 (5th Cir. 1972). Unquestionably the allegations must also be accepted as true when the trial court

considers dismissal on its own initiative before even receiving any motions from defendants. In view of the general condition of medical care in the Texas Department of Corrections, *infra*, there is every reason to believe that Gamble's allegations are in fact true.

Finally, appellate courts should scrutinize dismissal of civil rights actions with special care. *Lucarell v. McNair*, 453 F.2d 836, 838 (6th Cir. 1972). Similarly, before a magistrate recommends dismissal or a trial judge adopts such a recommendation each should carefully scrutinize the factual allegations of the *pro se* civil rights petition. After the petition has been read in accordance with these rules, it cannot be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Kerner*, 404 U.S. 520, 521 (1972).

In short when summary dismissal is contemplated, *pro se* civil rights petitioners should be read liberally as to form, scrutinized carefully as to facts, and all allegations must be accepted as true. Petitioners (appellees' Fifth Circuit brief, p. 7) and the Fifth Circuit [*Gamble v. Estelle*, 516 F.2d 937, 940 (5th Cir. 1975)] agree with this approach. If these rules had been followed in the present case, the action would not have been dismissed.

4. When Gamble's complaint is read with great liberality as to form, is assumed as true, and is read with special scrutiny as to facts, it states not only deliberate indifference to Gamble's medical needs, but also a complete refusal of both diagnosis and treatment.

Petitioners readily admit (petitioners' brief, p. 9) that allegations of a *refusal* of medical care constitute a cause of action under 42 U.S.C. §1983. Gamble's complaint alleges both a refusal of medical care and deliberate indifference to Gamble's medical needs.

Counsel for respondent sympathizes with the difficulties which the magistrate and the district court encountered in examining the petition. While some of these difficulties resulted from the mistaken use of the prison deference rule, others were undoubtedly caused by the form and language of the petition.

The magistrate stressed in his Memorandum and Recommendation that the prisoner detailed "a program of medical treatment, examinations by prison doctors, hospitalization and medical lay-ins he received on approximately 24 separate occasions between the date of the injury and extending into early this year." (A-18, 19). The "treatment" Gamble received amounts to no treatment at all.

> . . . [F]ailure to provide medical care, or treatment so cursory as to amount to no treatment at all, may, in the case of serious medical problems, violate the Fourteenth Amendment.

Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970).

J.W. Gamble received no proper diagnosis, was given nothing but pain pills for a potentially severe lower back injury, and was placed in solitary confinement

when he refused to return to work for the very good reason that he was still in pain from the back injury. If this course of neglect and abuse is held to be adequate medical treatment—or any medical treatment at all—the Texas Department of Corrections will be free to dispense pain pills to all ill and injured prisoners until they collapse. And even then the T.D.C. personnel would not be liable for damages to such prisoners.

As pointed out in the Statement of the Case at the beginning of this brief, there is no indication in the record of *who* diagnosed Gamble as having a lower back strain. It could have been a medical assistant or even an inmate nurse. More important, there is no evidence whatsoever in the record that any diagnostic tests were ever conducted.

However, even if there had been a diagnosis, when and injury is diagnosed and medication indicated by the diagnosis is administered, but the symptoms of the injury persist, the obvious conclusion is that the diagnosis was wrong. The prison personnel thought Gamble had merely strained his back, so they prescribed pain pills and rest. Days, weeks, and months passed and the pain from Gamble's lower back injury persisted. Yet, no further tests were administered.

Diagnostic techniques for lower back injuries are well established and range from simple physical movements to complex chemical tests. The physical movements include having the patient lie down and raise his legs, raise his legs while sitting, and flex and move his neck. If the results of these tests are ambiguous or subsequently prove incorrect other available methods include electromyogram, x-rays, myelography, discography, and analysis of spinal protein fluid.

Cailliet, *Diagnosis of Low Back Pain,* 4 LAWYER'S MED. J. 199 (1968).

There can be no excuse for the failure to at least x-ray Gamble's lower back when it became evident that the injury was more than a simple muscle strain. The Fifth Circuit has dealt recently with an almost identical situation in *Robinson v. Jordan,* 494 F.2d 793 (5th Cir. 1974). A prisoner awaiting trial complained of severe rectal pains. He saw a doctor twice, and the doctor diagnosed the problem as hemorrhoids. The prisoner was refused x-rays and other clinical tests. Several months later the condition was diagnosed as advanced rectal cancer and it was necessary to remove a portion of the prisoner's colon and to leave him with an open colostomy.

The prisoner filed a *pro se* 1983 money damages claim for inadequate medical care. The Fifth Circuit vacated and remanded the district court's dismissal, relying in part on *Haines v. Kerner, supra,* and *Campbell v. Beto, supra.* The Court described the refusal of x-rays and other clinical tests as follows:

> This complaint may not be viewed under a narrow negligence or medical malpractice concept. A constitutional violation is asserted, however inartfully, of denial of essential medical care. . . .

Id. at 794.

The *Robinson* holding mandates that the dismissal of Gamble's complaint be vacated and remanded. When Gamble's petition is given careful scrutiny it is immediately obvious that Gamble, like Robinson, was incorrectly diagnosed at first. The continuation of his back pain made it manifest that the first diagnosis was simply wrong. Faced with this error, Dr. Astone or one

of the other prison doctors should have conducted further tests, just as the doctor in *Robinson* should have done. The fact that Gamble did not demand further tests is irrelevant. Lay prisoners cannot be expected to conduct their own diagnoses.

The conditions of both Robinson and Gamble were diagnosed. However, both were diagnosed incorrectly. Neither was given x-rays or other available clinical tests. Such a *refusal* of diagnosis constitutes an actionable denial of essential medical care.

In his Memorandum and Recommendation the magistrate stressed that Gamble underwent a "program of medical treatment." He notes the number of times Gamble went to the hospital, saw prison doctors, and was given medical lay-ins. (A-18). To a certain extent, the magistrate is correct. Gamble did receive treatment for his blood pressure and heart problems. He did not receive treatment for his lower back injury.

Among the drugs administered for the heart difficulties were quinidine (R. 12) and Ser-Ap-Es (R. 9). The former is a isomer of quinine and is used to treat cardiac arrhythmias, or absence of rhythm. DORLAND, ILLUSTRATED MEDICAL DICTIONARY 1261 (24th ed. 1965). Ser-Ap-Es has been found by the F.D.A. to be an effective treatment for hypertension. PHYSICIANS' DESK REFERENCE 694-696 (28th ed. 1974). In short, administering quinidine and Ser-Ap-Es to one with heart and blood pressure problems *is* treatment.

The drugs prescribed for the back injury were febridyne (A-5), tiognolos (A-7), zactirin (A-5), robaxin (A-5), and sodium salicylate (A-8). Febridyne is a pain pill. Tiognolos is a muscle relaxant. (A-7). Zactirin is a

form of aspirin. MARTIN, HAZARDS OF MEDICATION 831 (1971). Robaxin is a muscle relaxant which the F.D.A. has found to be of doubtful effectiveness. PHYSICIANS' DESK REFERENCE 1206-1207 (28th ed. 1974). Sodium salicylate is an analgesic, or pain reliever. DORLAND, *supra* at 1400. Aspirin, muscle relaxants, and analgesics all perform only one function, they relieve pain.

In addition to the prescription of the pain pills, Gamble was also put on cellpass-cellfeed, which meant he was to remain in his cell at all times. (A-5). Pain pills and rest are a reasonable course of treatment for a muscle strain in the lower back. When Gamble's pain continued it became obvious that his injury was of a more severe nature. Pain pills are no treatment at all for a damaged disc or vertebrae.

In *Sawyer v. Sigler*, 320 F. Supp. 690 (D. Neb. 1970), a prisoner had swelling in lymph glands and throat and continuous pain on the left side of his jaw and throat among other symptoms. The prisoner requested laboratory tests and biopsies, but none were performed. *Id.* at 694. In granting the prisoner's request for an examination by a specialist in cancer, the court stated:

> The record is devoid of any indication that Bartholomew has received any medical treatment, except the administration of medication for pain. . . .
>
> * * *
>
> If the treatment or lack of treatment of a prisoner is such that it amounts to indifference or intentional mistreatment, it violates the prisoner's constitutional guarantees. When a state undertakes to imprison a person, thereby depriving him largely

> of his ability to seek and find medical treatment, it is incumbent upon the state to furnish at least a minimal amount of medical care for whatever conditions plague the prisoner.

Id. at 695, 696. Three months of pain pills where it is obvious that they are doing no good does not equal even a "minimal amount of medical care."

Short of corrective surgery, several simple treatments are available for lower back injury, such as dry or moist heat treatment, exercises, or corsets. OBER, BACKACHE 72-74 (1955). None of these was utilized. Because of the earlier discussed failure to diagnose, the exact nature of Gamble's lower back injury is still unknown. What *is* known is that pain pills have exerted no curative effect. Yet, for three months pain pills are all that Gamble has received. Such indifference and cursory treatment amounts to no treatment at all and states an actionable claim under the Civil Rights Act. *Tolbert v. Eyman, supra; Sawyer v. Sigler, supra.*

Petitioners have cited various medical authorities for the propositions that *some* back injuries can be diagnosed by simple physical examinations and that *some* back injuries can be successfully treated with pain pills and rest. If Gamble's complaint is properly read and assumed as true, there can be no doubt that pain pills and bed rest proved ineffective in treating his back injury. All of petitioners' theorizing (petitioners' brief, pp. 15-17) as to the causes of Gamble's pain is sheer speculation and should be completely ignored. The *only* way that it can be determined whether Gamble received a diagnosis or adequate treatment is by examining his medical records.

When Gamble's complaint is examined under the "deliberate indifference" test, it is readily apparent that the complaint states a cause of action. The following acts constitute "deliberate indifference":

1. On November 12, 1973, Dr. Astone ordered that Gamble be placed on a lower bunk for one week. The Building Department refused to issue Gamble a lower bunk and he remained on a top bunk. (A-5).
2. On December 13, 1973, Dr. Gray prescribed Ser-Ap-Es for Gamble's high blood pressure. The hospital staff lost the prescription and Gamble did not receive the medication until December 17 (A-7).
3. On January 3, 1974, Captain Linsley told Gamble that if he did not return to work he would be sent to the farm. At this time, Gamble was receiving prescribed medication for heart trouble and back pain. (A-8).
4. On January 5, 1974, Lieutenant Ramsey told Gamble that if he did not return to work he would be sent to the farm. At this time, Gamble was still receiving prescribed medication for heart trouble and back pain. (A-8).
5. On January 7, 1974, at 8:00 a.m., Gamble asked to go on sick call because of lower back pain and migraine headaches. He was told he could not go. At 3:00 p.m. he was allowed to go to the hospital. (A-8).
6. On January 31, 1974, Gamble was taken before the unit disciplinary committee because of his refusal to work. On this date, Gamble was still taking medication for his back pain and heart

trouble. Captain Blunt, who himself had prescribed the heart medication which Gamble was still taking, testified that Gamble was in first class condition. No doctor testified at the hearing. Gamble was sent to solitary confinement. No doctor examined him before he went into solitary. (A-9, 10).

7. On February 4, 1974, at 8:00 a.m., Gamble asked to see a doctor because of chest pains and black outs. The guard had to check with the warden since the warden's permission is required before an inmate in solitary can see a doctor. Finally, at 7:30 p.m. Gamble was examined, and his condition was such that he was put in the hospital. (A-10).
8. On February 7, 1974, at 8:00 a.m., Gamble asked to go on sick call because of pain in his back, chest, and left arm. The guards *refused* to let him go. (A-11).
9. On February 8, 1974, at 8:00 a.m., Gamble again asked to go on sick call, and again the guards *refused* to let him go. (A-11).

A study supported by the Law Enforcement Assistance Administration of the United States Department of Justice has condemned explicitly practices such as the above.

> . . . the right to medical care is *not* one of the rights of which [inmates] have been deprived by judicial sentence, and the only care available to them is the care provided by the correctional system.

* * *

> *The best defense against litigation is a system of health care which offers consistent service of good quality in adequate supply.*
>
> * * *
>
> It is essential that appearance at sick call be recognized as an inmate *right*, not a privilege. No member of the correctional staff, for example, should approve or disapprove requests for attendance at sick call. Denial of access to sick call is an open invitation to inmates to sue the institution–for it is *prima facie* evidence of denial of medical care.

E. BRECHER and R. DELLA PENNA, HEALTH CARE IN CORRECTIONAL INSTITUTIONS 2, 11 (1975). On January 7 and February 4, 1974, Gamble asked at 8:00 a.m. on both days to see a doctor. On January 7 he was not allowed to see a doctor until 3:00 p.m., and on February 4, it was not until 7:30 p.m. On February 7 and 8, 1974, the guards *refused* to allow Gamble to see a doctor. *Completely aside from questions of diagnosis and treatment*, these refusals to allow Gamble to see a doctor constitute a *prima facie* case of denial of medical care.

Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 1974), involved allegations very similar to Gamble's, although *Bishop* was a class action. One plaintiff waited ten days to see a doctor about an injured shoulder. One plaintiff who had lost 30 pounds in three weeks was given vitamin pills. A subsequent blood test revealed massive liver damage. A third person, who could not eat and was vomiting, was treated by a dispensary attendant. When he finally saw a doctor, the latter prescribed vitamins. Five days later the prisoner began turning yellow and was quarantined.

In granting the defendants' Rule 12(b) (6) motion, the district court judge examined each incident individually and determined no one of them constituted cruel and unusual punishment. In reversing and remanding, Judges Friendly, Feinberg, and Gurfein held:

> Taking the factual allegations as true, we think that they state a claim for relief under Section 1983. As Judge Coffrin recognized, deliberate indifference to the medical needs of a prisoner can amount to a Section 1983 violation. . . . A series of incidents closely related in time, within several months as these are, may disclose a pattern of conduct amounting to deliberate indifference to the medical needs of prisoners. We hold the cumulation of incidents alleged in the complaint entitled plaintiffs to a trial of the underlying allegation of deliberate indifference to their medical needs.

Bishop v. Stoneman, 508 F.2d 1224, 1225-26 (2d Cir. 1974). Similarly, the cumulation of the incidents set forth above which involved Gamble amounts to deliberate indifference to his medical needs.

In summary, the magistrate and the district court applied the *wrong* test–the discredited prison deference rule–to Gamble's complaint. The Fifth Circuit, reading the complaint with great liberality as to form, special scrutiny as to facts, and assuming it as true, found a *refusal* of diagnosis and treatment. If one applies the deliberate indifference test, it is clear that Gamble has listed a series of incidents which constitute a *prima facie* cause of action under 1983 *completely aside from* issues of diagnosis and treatment.

B. The decision below is not in conflict with the decisions of other courts of appeals.

1. The court below found that Gamble's complaint alleged a refusal of diagnosis and treatment.

In seeking to invoke the jurisdiction of this Court, petitioners have alleged that the Fifth Circuit's holding in this case is in conflict with holdings from the other circuits. This allegation is simply not true. The Fifth Circuit held:

> We find the complaint sufficient in alleging that the action of the authorities was *tantamount to a refusal of medical treatment* and remand the case for further action in light of this opinion. (Emphasis added.)

Gamble v. Estelle, 516 F.2d 937, 938 (5th Cir. 1975). Hence, the strictest test of all was used in this case.

Petitioners' detailed listing of holdings from other circuits is an exercise in futility. Respondent Gamble readily agrees with petitioners that a mere disagreement as to diagnosis does not state a claim. Respondent and petitioners also agree that allegations of refusal of medical care do state a claim. Gamble's complaint alleged such a refusal.

A brief review of some of petitioners' cases indicates that the proper test is the aforementioned deliberate indifference test and that courts should always at least examine the medical records in cases such as Gamble's. Petitioners cite *Corby v. Conby*, 457 F.2d 251 (2d Cir. 1972), and *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864 (2d Cir. 1970), for the proposition that in the Second Circuit an alleged denial of care states a claim

while alleged inadequacy of care does not. The more recent Second Circuit cases *Bishop v. Stoneman*, 508 F.2d 1224 (2d Cir. 1974), and *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974), both hold that a claim under 1983 is stated by allegations of deliberate indifference to the medical needs of prisoners. The older Second Circuit case *Blanks v. Cunningham*, 409 F.2d 220, 221 (2d Cir. 1969), makes the point that "the propriety of an evidential hearing . . . can be determined by examining the prisoner's allegations in the light of the prison's medical records." Respondent Gamble fully agrees. No court has yet examined his medical records.

Petitioners also place considerable emphasis on the Ninth Circuit cases *Riley v. Rhay*, 407 F.2d 496 (9th Cir. 1969), and *Stiltner v. Rhay*, 371 F.2d 420 (9th Cir.), cert. denied, 387 U.S. 922 (1967). Petitioners chose to ignore the more recent Ninth Circuit case of *Tolbert v. Eyman*, 434 F.2d 625 (9th Cir. 1970). The *Tolbert* holding is very applicable to the present case. The Ninth Circuit held:

> . . . failure or refusal to provide medical care, or *treatment so cursory as to amount to no treatment at all*, may, in the case of serious medical problems, violate the Fourteenth Amendment. (Emphasis added.)

434 F.2d at 626. Tolbert saw prison doctors who refused to believe that he had the eye condition of which he complained. Tolbert also received medication, but it was completely inadequate and his symptoms worsened. Such cursory treatment amounts to no treatment at all. Continued prescription of pain pills and bed rest over a period of months for a potentially serious back injury which does not respond also amounts to no treatment at all.

Petitioners also cite *Freeman v. Lockhart,* 503 F.2d 1016 (8th Cir. 1974), for the proposition that a claimed inadequacy of treatment does not state a cause of action absent exceptional circumstances. Once again, there is a more recent case directly in point. In *Wilbron v. Hutto,* 509 F.2d 621 (8th Cir. 1975), the Eighth Circuit adopted the deliberate indifference test. Also, in *Wilbron,* the Eighth Circuit commended the district court judge for securing the plaintiff's medical records from the prison, and examining them along with the complaint.

In summary, the Fifth Circuit's decision does not conflict with other circuits' holdings because the Fifth Circuit applied the strictest test of all. A review of the other circuits reveals a trend toward the deliberate indifference test and shows that other circuits wisely recommend that the district judge obtain the medical records to read with the complaint.

2. The "exceptional circumstances" test advocated by petitioners is not the test of eight other circuits, and is unacceptable because it would negate the injunctive relief available under 42 U.S.C. §1983 to prisoners receiving inadequate medical care.

As pointed out above, the Second and Eighth Circuits have explicitly adopted the deliberate indifference test. While the Fifth and Ninth Circuits have not articulated that test by that name, some holdings in those circuits in effect use the deliberate indifference test. Thus, petitioners' exceptional circumstances rule is not the rule in the majority of circuits, and it certainly

should not be because it would negate the injunctive relief available under 42 U.S.C. §1983.

42 U.S.C. §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity, or other proper proceeding for redress.* (Emphasis added.)

Although Gamble's *pro se* petition does not specifically request equitable relief, he does seek "such other end [sic] further relief as this court may deem just, proper and equitable." (A-14). The required liberal reading of the petition makes it clear that a critical part of the relief which Gamble requests is the proper medical treatment of his still-painfull back condition. He is not bringing suit solely for money damages.

The relief sought by J. W. Gamble is similar to the relief obtained by one of the plaintiffs in *Sawyer v. Sigler,* 320 F. Supp. 690 (D. Neb. 1970). The order in that case read:

> An order will be entered directing the warden of the Nebraska Penal and Correctional Complex to provide for Bartholomew an examination by a specialist in cancer and allied diseases, whether within or without the Nebraska Penal and Correctional Complex, including such biopsies and other tests as such specialist deems advisable, all within 30 days of the date of the order, and thereafter to provide such treatment as such specialist in consultation with one or more

> physicians employed by the Nebraska Penal and Correctional Complex deem advisable, insofar as such treatment reasonably is available. The court will retain jurisdiction of the case for the purpose of being informed of the examination and treatment at periodic intervals.

Id. at 695.

This is one of the forms of relief which J. W. Gamble seeks. Under petitioners' "exceptional circumstances" test such relief will either be unavailable or will become available only after a prisoner has been crippled by his injury or illness.

Before the Fifth Circuit petitioners based their "exceptional circumstances" test largely on the holdings in *Hutchens v. Alabama*, 466 F.2d 507 (5th Cir. 1972), and *Robinson v. Jordan*, 494 F.2d 793 (5th Cir. 1974). In *Hutchens* there had been a medical determination that the plaintiff had terminal cancer of the palate and throat and that his life expectancy was less than two months. In *Robinson* the plaintiff had advanced rectal cancer and had to have a portion of his colon removed leaving him with an open colostomy. Presumably these grim facts are the "exceptional circumstances" of which petitioners speak.

To always require proof of similar harm from past inadequate care would make sense if the only relief afforded by 1983 was money damages. If that were the case, plaintiffs would have to prove such facts to establish injury entitling them to damages. However, as earlier discussed, 1983 is also designed to provide equitable relief from ongoing inadequate care.

Petitioners seem unaware of this purpose of 1983. They argue that before a prisoner is entitled to relief

under the Civil Rights Act he must come into court with an open colostomy or with terminal cancer resulting from inadequate past medical care. This argument not only ignores the equitable relief available under 1983 but also reflects a tragically inhumane attitude toward the physical well-being of the inmates of the Texas prison system.

J. W. Gamble does seek money damages for the pain and suffering which has been caused by inadequate past medical treatment. He will also seek an order from the district court directing the Department of Corrections to allow him to have a proper examination and to receive the treatment indicated by such examination. Respondent Gamble prays that this Honorable Court grant him at least the opportunity to present his request for relief to a jury and that it not condition that grant on his entering the courthouse permanently and seriously crippled.

II.

THE DECISION BELOW DOES NOT DESIGNATE THE FEDERAL DISTRICT COURTS AS MEDICAL REVIEW BOARDS FOR PHYSICIANS IN CORRECTIONAL INSTITUTIONS.

Petitioners' second issue is based completely on a presupposition of the central issue of this lawsuit. They state:

> If a complaint which stipulates that the inmate has seen several doctors on numerous occasions and that these doctors have diagnosed his injury

and prescribed treatment does not warrant summary dismissal, no complaint will.

Petitioners' brief, p. 18. As has been discussed above, there is nothing in Gamble's complaint to indicate that any diagnostic tests whatsoever were conducted for his back injury or that the diagnosis in his medical record was put there by a doctor.

A. The adequacy of medical treatment in prisons is subject to Eighth Amendment scrutiny.

Petitioners' second point is a thinly veiled attempt to return to the hands-off or prison deference rule of *Lawrence v. Wainwright, supra,* which rule has been thoroughly discredited and rejected. In *Newman v. Alabama,* 503 F.2d 1320, 1329 (5th Cir. 1974), the Fifth Circuit held:

> . . . [T]his court has been cognizant of the fact that deference which shields officials engaging in intemperate action and which excuses judicial myopia is incompatible with our role as arbiters of the Constitution and hence cannot be countenanced. Thus, while obedient to our limited function in passing upon prison complaints, we have not been impervious to the need to fetter prison officials where constraints are constitutionally appropriate. For example, in Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968), we remonstrated that once an individual is incarcerated, "any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny." And we amplified these concerns in Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972), observing that:

> "Whatever may be the outer contours of the 'prison discipline rule,' it is apparent that the courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being. . . . If 'the deprivation of basic elements of hygiene' has consistently been held violative of constitutional guarantees . . ., then certainly practices which result in the deprivation of basic elements of adequate medical treatment, particularly such deprivation as immediately threatens life and limb, would be equally vulnerable."

The basis of the Fifth Circuit's decision in the present case was not a disagreement with what may have been done by the prison doctors but a need to find out what, in fact, the doctors did do. The Court did not prescribe a course of medical action, as petitioners allege (Petitioner's brief, p. 18). The only thing which the Court did, was to find that under the facts alleged in Gamble's petition it was not clear beyond doubt that Gamble could prove no set of facts in support of his claim which would entitle him to relief. *Haines v. Kerner, supra.*

Petitioners' second point in their brief extends to an absured degree the concept that a difference of medical opinion does not constitute a cause of action under 42 U.S.C. §1983. Their mistaken version of the rule would deny a prisoner-patient his cause of action if he *ever* saw a prison doctor. Under this approach the federal trial court would have to dismiss even claims such as that in *Robinson v. Jordan,* 494 F.2d 793 (5th Cir. 1974). In *Robinson,* the prisoner complained of rectal pains and a digital examination was made. The prison doctor diagnosed the problem as hemorrhoids and

prescribed suppositories. For six months the pain persisted but the prison doctors refused to take x-rays and continued to prescribe suppositories. Finally, it was determined that the prisoner had advanced rectal cancer and a colostomy was performed. The Fifth Circuit rightfully held that although *Robinson* did receive diagnosis and treatment he had stated a Section 1983 cause of action. Under petitioners' rule, Gamble will have to come into court in a wheelchair as a paraplegic before he will be recognized to have even stated a claim against the Texas prison system.

B. "Flood of litigation" arguments must be rejected when the claim is made that a protected constitutional right has been seriously infringed.

The essence of petitioners' second issue appears on page 19 of their brief where they cite *Procunier v. Martinez*, 416 U.S. 396, 405 n. 9 (1974), for the proposition that allowing complaints such as Gamble's to survive summary dismissal will cause a flood of litigation in the courts. One should note that in *Procunier* the Supreme Court *affirmed* a finding that censorship by prison officials of direct personal correspondence and a ban against attorney-client interviews conducted by law students violated the constitutional rights of the prisoners. It is also interesting to note that immediately following the language quoted by petitioners, Justice Powell went on to say:

> As one means of alleviating this problem [courts being swamped with matters of prison administration and reform], the Chief Justice has suggested that federal and state authorities explore the possibility of instituting internal administrative procedures for disposition of inmate grievances.

416 U.S. n. 9. Such procedures will be discussed later in this brief.

This same "flood of litigation" argument was raised before this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In his concurring opinion, Justice Harlan stated:

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetry inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

403 U.S. at 411. Presumably, even petitioners would not deny that "the adequacy of . . . medical treatment [in prisons] . . . is clearly subject to Eighth Amendment scrutiny." *Gates v. Collier*, 501 F.2d 1291, 1302 (5th Cir. 1974). Such an issue cannot be avoided on the basis of a "flood litigation" argument.

C. The overburdening of the federal district courts with cases such as Gamble's would be alleviated by upgrading the medical programs of the state prison systems and by instituting within the state prison systems programs such as that in the federal prison system to distinguish between meritorious and non-meritorious claims of inadequate care.

The overburdening of the federal curts with prisoners' complaints is a very real problem and it was addressed by Justice Clark and Judges Goldberg and Ainsworth during oral argument and in their written opinion in this case.

> Federal courts have traditionally been reluctant to interfere with the administration of prison systems, especially those of the states; nevertheless we note that there has been a steady increase of cases in the federal courts involving attacks on the medical, as well as the disciplinary, procedures followed in prisons. While the bench has time and again suggested that administrative procedures be established to handle complaints such as the one that Gamble presents here, the response from the the states has been minimal. As a result, we are obliged to hear and and decide such cases under somewhat broad constitutional principles.

Gamble v. Estelle, supra, at 940.

On the one hand, the State of Texas is responsible for Gamble's claim being in the federal courts because of the inadequate medical care its prisons gave him and because of its failure at that time to establish an administrative procedure which might have given Gamble relief or screened his case out if it was in fact frivolous. On the other hand, the state then comes

before the federal courts and asks that Gamble's summary dismissal be upheld because there are simply too many cases like it for the Attorney General's office to handle. This is no solution.

In his report on the Federal Judicial Branch – 1973, Chief Justice Burger stated:

> There is one area of litigation in the district and circuit courts that must be carefully examined to determine whether other and better methods may be available. Twenty years ago complaints filed in federal courts by prisoners in state prisons were hardly enough to give any concern. In fiscal 1972, there were more than sixteen thousand petitions of various kinds filed challenging the validity of the conviction even after full review by other courts. In addition, prisoners have filed more than four thousand cases under the Civil Rights Act claiming mistreatment or denial of rights.
>
> . . .
>
> . . . The thousands of prisoners complaints filed in federal courts get there by using statutes and procedures intended for quite different purposes but so broadly drawn by legislators or construed by the courts that the umbrella of the law seems to cover them. I do not suggest at all that federal courts deny protection. What I suggest is that we use some common sense and devise procedures that give prompt attention to valid complaints without calling on eleven federal judges and a train of other public employees to deal with three dollars worth of cigarettes.
>
> . . .
>
> Let me suggest just a few alternatives that we could consider with profit:
>
> 1. Create a statutory administrative procedure for federal prisons to provide for hearing prisoner

complaints administratively within the prison and require that these procedures be exhausted before any proceeding could be filed in federal courts. I believe many states would follow the federal example.

2. Establish informal grievance procedures in the state systems to hear prisoner complaints as a good many enlightened prison administrators have long since done. The American Bar Association commission dealing with correctional problems continues its important work, and I commend the subject of prisoner grievances to its attention.

3. Federal judges, acting within their existing authority, should consider referring habeas corpus and civil rights cases brought by prisoners for preliminary consideration by a United States magistrate sitting as a special master and reporting to the court.

Burger, *Report on the Federal Judicial Branch–1973*, 49 A.B.A.J. 1125, 1128 (1973).

One month after the Chief Justice's address, the Federal Bureau of Prisons instituted on a pilot basis an Administrative Remedy Procedure at the United States Penitentiary, Atlanta, Georgia, and at the Federal Correctional Institutions at Danbury, Connecticut, and Tallahassee, Florida. Norman A. Carlson, Director of the Federal Bureau of Prisons, has written:

> Under this procedure, inmates may file a written complaint with the warden, obtain a receipt for the filing and receive a written response within 15 business days. If not satisfied with this response, the inmate may appeal to my office, obtain a receipt for filing and receive a written response within 30 business days.

> We believe the pilot project demonstrated the procedure is responsible to inmates' complaints . . . approximately 35% of the inmates' complaints were resolved in the inmates' favor. In addition, the procedure gave the institutional staff an opportunity to review many policies and procedures.
>
> Based on the favorable experience with the pilot project, we are instituting the procedure in all Federal Bureau of Prisons institutions effective April 1, 1974.

Federal Bureau of Prisons Adopts Administrative Remedy for Prisoner Grievances, 3 PRISON L. RPTR. 154 (1974).

The Bureau's policy statement points out that this procedure "provides a written record in the event of subsequent judicial or administrative review and that such procedure will reduce the volume of suits filed and develop a fact record which will aid the courts in fair and speedy adjudication of those which are filed." 3 PRISON L. RPTR., *supra*. If such a procedure had been available in the Texas prison system at the time Gamble's complaint arose, vast amounts of time, effort, and money expended by courts and lawyers might have been saved.

Of course, if a federal inmate is not satisfied with the response to his complaint and appeal, he may file suit in an appropriate court and attach documentary proof that he exhausted his administrative remedy. 3 PRISON L. RPTR., *supra*, at 155. These procedures are now viewed by the federal courts as the same as other administrative remedies, and they *must* be exhausted before the prisoner can take his case to court. *Ross v. Henderson*, 491 F.2d 116 (5th Cir. 1974).

An almost identical program has very recently been established in Texas. The rules and regulations for the Inmate Legal Services Project were published on November 1, 1975. Under this program, as in the federal program, an inmate's grievance goes to the warden and then, if the inmate is not satisfied, it goes to the Director of the Texas Department of Corrections, W. J. Estelle, one of the petitioners in this lawsuit. If the inmate is still dissatisfied with the response, he will receive an interview with a Project Attorney Fact Finder.

These Fact Finders, who have no organizational or financial connection with the T.D.C., make regularly scheduled visits to all T.D.C. units. They receive the record of an inmate's grievance in time to review it prior to the interview. The Fact Finders are *not* the personal attorneys for the inmates, and they so advise the inmates at the outset of the interviews. The inmate is also advised that the record of the interview is available to the federal courts if litigation ensues.

The interview can have one of three results. First, the Fact Finder can advise the inmate that the grievance has no merit and should be dropped. If, in the face of such advice, the inmate chooses to pursue his grievance, a different Project lawyer will be appointed to represent the inmate before the courts. This second lawyer will be the inmate's personal attorney and will be compensated out of funds provided by the Law Enforcement Assistance Administration of the United States Department of Justice. Second, the Fact Finder may determine that the warden and director rejected a meritorious grievance because the inmate did not properly present it. In this event, the Fact Finder will assist the inmate in redrafting the grievance and the

inmate may then resubmit it. Third, if the Fact Finder determines that the inmate has a valid grievance which was properly presented but rejected by the prison officials, he will so report to the Project. A second lawyer, compensated with L.E.A.A. funds, will then be appointed as the inmate's personal attorney to aid in his litigation. See TEXAS DEPARTMENT OF CORRECTIONS, RULES AND REGULATIONS AND GRIEVANCE PROCEDURES (Nov. 1, 1975).

It is, of course, pointless to speculate on what the outcome of Gamble's grievance would have been if this system had existed prior to his filing his lawsuit. One difference is certain. The complaint would have reached the district court accompanied by a well-developed record including input from both prison officials and attorneys completely independent from the prison system. Instead, the district court received only the complaint without an answer, any medical records, or anything else.

The State of Texas has taken great strides forward which should insure that no cases such as Gamble's come out of Texas in the future. All future prisoner grievance suits should be accompanied by a record when they reach the district court. Petitioners' "flood of litigation" arguments have now lost whatever validity—if any—they may have once had in Texas.

The implementation of the Inmate Legal Services Project is a recognition of the complete inadequacy of the previous system of which Gamble is a victim. Gamble must now have his day in court to have the opportunity to develop the kind of record which *all* Texas inmates can now develop through the Inmate Legal Services Project. The Court's decision in this case

will be vital to the constitutional rights of prisoners in states which have not yet established such enlightened review procedures.

In summary, the Fifth Circuit did not designate federal district courts as medical review boards. It simply found that under the facts alleged in Gamble's complaint it was not clear beyond doubt that Gamble could prove no set of facts in support of his claim which would entitle him to relief. Petitioners seek a return to the prison deference rule and to bar federal courts from reviewing the adequacy of medical treatment in prisons. This argument has long ago been rejected, as has the "flood of litigation" agrument when the claim is made that a protected constitutional right has been seriously infringed. Finally, the federal prison system and the Texas prison system have recognized the need for dealing with cases such as Gamble's *before* they reach the courts. Gamble is in court, and he must now be allowed to develop the kind of record which would allow the informed and fair reading which his petition did not receive when it was filed *two and one-half years ago.*

III.

THE FIFTH CIRCUIT WAS CORRECT IN TAKING JUDICIAL NOTICE OF THE WOEFULLY INADEQUATE CONDITION OF MEDICAL CARE IN THE TEXAS PRISON SYSTEM.

A. The Fifth Circuit did not determine any ultimate issue based on the condition of medical care in the Texas prison system.

While respondent Gamble strongly urges that the Fifth Circuit was correct in taking judicial notice of the condition of medical care in the Texas prison system, this Court need not consider this issue because any error which the Fifth Circuit may have committed was harmless. 28 U.S.C. §2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Petitioners complain of the Fifth Circuit's consideration of the Report of the Citizens' Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature (hereinafter "Advisory Committee Report") (appendix to Gamble's Fifth Circuit brief). However, petitioners do not even argue that consideration of this report affected the outcome of the case or prejudiced their substantial rights. In fact, on page 15 of their petition for certiorari, petitioners state that the Advisory Committee Report was irrelevant to the present case. In the absence of any complaint by

petitioners of prejudice to their substantial rights, this Court should not even consider petitioners' third issue.

The opinion below states:

> Moreover where the general medical services afforded by the State in its prisons are publicly known to be "woefully inadequate," the court must exercise the highest degree of care to make certain that a prisoner is not deprived of his federally secured constitutional right to medical care.

Gamble v. Estelle, supra, at 940. The Court cited the Advisory Committee Report as but one example of this public knowledge. Federal courts must *always* exercise "the highest degree of care" to insure that prisoners are not denied that degree of medical care guaranteed by the Constitution. This duty of vigilence is neither heightened nor diminished by public knowledge of the inadequacies of the prison system in question. Thus, there can be no serious contention that the Fifth Circuit's reliance on the Advisory Committee Report played any part whatsoever in the decision in this case. Where petitioners themselves do not contend that an act of the circuit court prejudiced their substantial rights and where it is clear from the record that the act played no part in the circuit court's decision, this Court should not consider any complaints as to said act.

B. This Court and the Fifth Circuit may take judicial notice of "legislative facts" in arriving at their decisions.

If this Court should choose to determine whether the Fifth Circuit should have considered the Advisory

Committee Report, respondent urges that the Report was properly before the Fifth Circuit and is also properly before this Court. Furthermore, the Final Report of the Joint Committee on Prison Reform, 63d Texas Legislature, December 1974 (hereinafter "Joint Committee Report"), the contents of which are discussed later in this brief, is also properly before this Court.

In their petition for certiorari (p. 14), petitioners attack the Fifth Circuit's consideration of the Advisory Committee Report on the grounds that the Report was hearsay and that it was not presented to or litigated before the district court. Indeed, *nothing* was litigated before the district court and only Gamble's complaint was presented to it. However, petitioners' objections completely ignore the power of an appellate court to take judicial notice of relevant reports of public bodies even where such reports were not introduced at trial.

In *Stasiukevich v. Nicolls,* 168 F.2d 474, 479 (1st Cir. 1948), the court held:

> The official report of a legislative or congressional committee is admissible in evidence in a judicial proceeding, as an exception to the hearsay rule, where the report, within the scope of the subject matter delegated to the committee for investigation, contains findings of fact on a matter which is at issue in the judicial proceeding. . . . Indeed, the court could properly take judicial notice of the report, without its formal introduction into evidence.

Not only official reports of public bodies, but also their records which are public documents may be judicially noticed by an appellate court although there was no formal proof of such records in the trial court. See

Interstate Natural Gas Co. v. Southern California Gas, 209 F.2d 380, 385 (9th Cir. 1953); *Fletcher v. Jones,* 105 F.2d 58, 61-62 (D.C. Cir. 1939).

The Advisory Committee Report's cover letter to the Joint Committee states:

> . . . [T]he Advisory Committee was appointed by the Joint House-Senate Legislative Committee to examine the Texas Department of Corrections, survey citizen views throughout the state and report its findings and recommendations. Our Report responds to this mandate.

Appellant's Fifth Circuit Brief, p. A-1. Thus, the Advisory Committee was appointed by the Joint Committee; its Report is both a public document and a part of the records of a legislative committee; and, therefore, under the above cases the Fifth Circuit was free to take judicial notice of the Report. This Honorable Court has for decades taken judicial notice of reports from Congressional committees. See *State of Arizona v. State of California,* 283 U.S. 423, 454 (1931).

C. Medical care in the Texas prison system is "cruel and inhumane . . . causes unjustifiable pain and suffering to inmates . . . [and] sometimes results in needless death or crippling disease or injury."

The above quotation comes from the Advisory Committee Report. Appellant's Fifth Circuit brief, p. A-7. Gamble presented this Report to the Fifth Circuit rather than the Joint Committee Report for the simple

fact that the latter had not yet been published on the date the brief was filed.

The facts, comments, and conclusions of the two reports are almost identical. The Joint Committee Report states:

> . . . [P]hysicians, TDC officials, and inmates participate in the delivery of medical care. Since only two full-time physicians are employed by TDC currently (a maximum of three have been employed by TDC during the Committee's study), each prison unit's medical care program is supervised by a TDC official with a military background in paramedical service. First aid, diagnosis of the severity of an inmate's complaint, and administering limited forms of medication are among the primary duties of the medical assistant. The inmates assisting in the medical care program often have broad responsibilities. Inmates assist the medical assistant during the day and also substitute for him during the night. Staff research has produced evidence that inmates are given much latitude in performing minor surgery, in providing general surgical assistance, and in administering medicine.
>
> . . .
>
> The Walls hospital [where Gamble was located] is a several hundred bed health care unit which is designed to provide care for seriously ill or injured inmates who cannot be cared for at the unit level. Operated by Dr. Ralph Gray, M.D., and administered by Captain Lloyd Driver, Walls unit medical captain and X-ray Technician, the hospital has been labeled as a "fire trap" by the Texas Hospital Association. Although as much as possible is done to maintain high standards of professionalism and sanitation, problems with insect and rodent control, inadequate toilet and shower facilities,

food preparation, record keeping, and emergency procedures abound. For example, the hospital has no evacuation procedure in the case of a fire and the crowded wards and wings do not permit adequate escape routes.

All nursing capabilities are the function of inmates who are able and willing to contribute their services. No formal training is available for inmate nurses, although an informal system of training by experience has seemed to function adequately. Unofficial inmate responsibilities include administering medication and injections. The "chief resident" and the "head nurse" of the hospital are both inmates who alternate twelve hour shifts seven days a week. The degree of responsibility which they are afforded is a good indicator of the necessity TDC places on its inmate staff.

. . .

Immediate improvements of both the unit and hospital levels are necessary for delivery of adequate health care services. Program design and facilities are both outdated and in need of review and restructure. A recent court action ordered the Alabama prison system closed for failure to provide adequate medical programs for the inmate population. Texas faces similar inadequacies and should take steps to reconstitute its health care system along more professional lines.

Of utmost concern is the glaring need for more doctors and trained medical personnel. While both TDC medical assistants and inmate nurses presently provide what seems to be adequate paramedical assistance, they are not substitutes for physicians. When one considers that two physicians are the only full-time physicians serving TDC's over 17,000 inmate population, one must seriously

question the priorities of the TDC administration. The American Correctional Association's medical service standards calls for a minimum of one physician and one psychiatrist for every prison unit housing over 500 inmates and an additional physician for every 500 to 1000 additional inmates. At this level of staffing, TDC should have nineteen more full-time physicians and thirteen more full-time psychiatrists.

. . .

The Diagnostic medical examination is too brief to adequately determine the needs of the incoming inmates. During much of the period in which the Committee staff was researching the medical program one doctor was conducting the over-500 per month physical examinations of incoming inmates (as well as operating the Walls hospital). An increase in medical personnel–specifically physicians–would provide some immediate solutions to the inadequacies of the Diagnostic process.

. . .

The Walls hospital is obviously the most essential part of TDC's medical program and needs the most restructuring. The THA reports on the Walls hospital severely criticized the hospital's sanitation and structure. From operating room deficiencies to use of available space, the THA report specifically indicated needed areas for improvement which include almost every aspect of the hospital's operation. The Committee recommends that the Walls hospital either be totally abandoned and a new facility built, or that the hospital be remodeled and expanded. The Committee does not feel that this suggestion is inconsistent with its recommendation that "construction or expansion" of new prison facilities be halted. Medical services, particularly hospital services, are a necessary and presently inadequate

function of the prison system and should be immediately brought up to acceptable standards.

Restructuring and sanitizing the Walls hospital are not the only reforms which are necessary. The medical equipment which is in use in the hospital is, in some cases, outdated, and, in other cases, unsafe. For example, the operating rooms are cooled by window unit air conditioners, a practice which is blatantly in violation of the Texas Hospital code. The intensive care ward has no heart monitoring equipment for heart attack victims, a basic device in any modern hospital. TDC should actively petition the Legislature for funds to be used specifically for providing the Walls hospital with adequate equipment and supplies.

Joint Committee Report, pp. 54-57.

The section of the Advisory Committee Report cited by the Fifth Circuit dealt with the terrible shortage of trained and competent medical personnel. *Gamble v. Estelle, supra,* at 940-941. As can be seen in the above quotation, these same figures were presented in the Joint Committee Report.

When a central issue in a case is the medical care received by a prisoner, and the only evidence before an appellate court is a *pro se* complaint by the almost illiterate prisoner, it is entirely proper and, perhaps, even mandatory for the court to examine proper evidence of the quality of medical care at the institution where the complainant is incarcerated. Judicial notice is not limited to trivial or peripheral matters. To the contrary, an appellate court can and should take judicial notice of facts which are absolutely decisive in a case if such facts are subject to judicial notice. See *United States v. City of Jackson,* 318 F.2d 1 (5th Cir. 1963).

In summary, petitioners argue that the Advisory Committee Report was irrelevant and hearsay but they do not allege that their substantial rights were prejudiced by its consideration. If it was irrelevant and no prejudice occurred, then there was no reversible error. Respondent Gamble contends that the Advisory Committee Report was a proper public document for judicial notice by the Fifth Circuit, and that both that Report and the Joint Committee Report are properly before this Court. Further, in order to better understand and interpret Gamble's somewhat rambling and occasionally confused narrative, it is essential that the appellate courts utilize all available information on the quality of medical care in the system to which Gamble was subjected.

CONCLUSION

J. W. Gamble alleges that his Eighth Amendment guarantee against the infliction of cruel and unusual punishment has been violated by the petitioners who have exhibited deliberate indifference toward Gamble's medical needs. Justice Blackmun, while on the Eighth Circuit, wrote the following about the Eighth Amendment:

> The scope of the Amendment is not "static." It "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."
>
> . . .
>
> . . . [W]e have a flat recognition that the limits of the Eighth Amendment's proscription are not

> easily or exactly defined, and we also have clear indications that the applicable standards are flexible . . . and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable.

Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

One standard of decency in our society which has undergone dramatic evolution in recent decades is health care.

> The American system of health care has made revolutionary strides. . . . The horse-and-buggy doctor has been superseded by platoons of specialists armed with new equipment, new drugs, and new techniques. . . .
>
> . . .
>
> Revolutionary changes have also occurred in the *financing* of health care services. . . . [E]ach of these and other innovations in turn have made an increasingly broad range of health services available to an increasingly large proportion of the civilian population. Comprehensive health care is thus no longer a privilege of the few; it is rapidly on the way to becoming a right to which all are entitled.
>
> . . .
>
> . . . [T]he right to medical care is *not* one of the rights of which [prisoners] have been deprived by judicial sentence, and . . . the only care available to them is the care provided by the correctional system.

E. BRECHER AND R. DELLA PENNA, HEALTH CARE IN CORRECTIONAL INSTITUTIONS 1, 2 (1975). There can be no excuses for deliberate indifference toward the medical needs of a prisoner. It is unconstitutional and must not be countenanced.

J. W. Gamble has alleged a refusal of diagnosis and treatment and a series of incidents which constitute deliberate indifference to his medical needs. All he now asks is the opportunity to prove the truth of his allegations.

PRAYER

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be in all things affirmed.

Respectfully submitted,

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